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Constitutional Pluralism Revisited

Neil Walker

1. The Claim of Constitutional Pluralism

Like most theories that have enjoyed a modicum of popularity, constitutional pluralism – particularly as applied to the EU – has also attracted a deal of scepticism. Briefly stated, constitutional pluralism (CP) in its original European context¹ maintains that:

(1) *the overall complex² of law pertaining to the EU embraces multiple sites (i.e., the supranational site of the EU and the national sites of each of its 28 member states), each with its own claim to constitutional authority;*

2) *there is, in fact, no dominant understanding of this complex that holds across these multiple sites, according to which the claims to constitutional authority associated with each site would be ordered within a hierarchy or otherwise reconciled and resolved by reference to a single meta-authoritative standard; rather, each site is associated with*

¹ For discussion of constitutional pluralism beyond the European context, see e.g. M. Avbelj and J. Komarek (eds) *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart, 2012); N. Krisch *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: OUP, 2010); N. Walker *Intimations of Global Law* (Cambridge: CUP, 2015) ch.3.

² I use the term ‘complex’ advisedly, as a neutral, pre-theoretical description of something that is made up of different elements linked in a close or complicated way. Other more familiar terms to account for the holistic quality of law, such as ‘system’ or ‘order’ are avoided at this initial stage as they already carry with them, at least in some usages, particular understandings of the nature of the connections between the parts of the complex that it is precisely the point of constitutional pluralism to elucidate and evaluate. As will become clear in the text, in developing the theory of constitutional pluralism I favour ‘system’ to describe the institutionally ‘thick’ and normatively comprehensive and self-referential frameworks of national and supranational law, and treat ‘order’ as extending to any coherent normative formation, including the looser forms of coherence that might emerge from a repetitive pattern of interaction between different legal systems. In this I follow K. Culver and M. Guidice, ‘Not a system but an order: An inter-Institutional View of European union Law’ in J. Dickson and P. Eleftheriadis (eds) *Philosophical Foundations of European union Law* (Oxford: OUP, 2012) 54.

a plausible claim to ultimate constitutional authority that stands independently of the other claims

(3) In order to sustain the overall complex in a constitutionally optimal fashion, each site ought to acknowledge and somehow accommodate the claims of the others as independent sites of constitutional authority – thereby ensuring the continuing absence of a single dominant authoritative framework

Stated in these three propositions, CP differs from and has been challenged by what may be termed particularist, holist and federalist conceptions of EU law. Subscribers to those other conceptions claim that CP is unsatisfactory in one or more of a number of respects. In terms of the first and second propositions set out above, CP may offer a false or inadequate account of the constitutional framework of the EU. Or, contrary to the claim in the third proposition set out above, it may have normatively undesirable implications. More generally, CP may be regarded as indistinct or as only trivially distinct from one of the other conceptions, or as offering an inferior version of another conception, and so as supplying a redundant perspective, or worse, a perspective that distorts or distracts from a similar but superior perspective.

The value of CP, then, depends, in the first instance, on how well it can answer these objections. Is CP's depiction of the EU constitutional arena compelling, or at least tenable (*the descriptive/explanatory claim*)? To the extent that it is tenable, does it paint an attractive picture of a European future, or at least one that is less unattractive than other perspectives, bearing in mind that what counts as attractive in this context is both contestable and complex (*the normative claim*)? And if it does pass these two tests, does it actually constitute an original position, or does it merely borrow the clothes of other positions better suited to its purposes (*the distinctiveness claim*)?

But even if these objections can be overcome and the alternative claims of the rival theories of the legal character of European integration rebutted, this would not amount to a full vindication of the explanatory appropriateness or normative value of CP. The shortcomings of rival theories are not reason enough to endorse CP. I do nevertheless want to insist upon this first step, and so begin by making the argument that CP does not fail on account of any superiority demonstrated or critique offered by these rivals. CP's broader challenge, however, and also its broader prospects, derives from a more general difficulty associated with the legal and political conceptualisation of the European Union. In a nutshell, for reasons developed below, it is difficult - and as the European supranational experiment enters a turbulent seventh decade it becomes ever more difficult - to imagine the EU as a legitimate legal and political construction other than by invoking the structures and values of constitutionalism; that, indeed, is why I use the language of '*constitutionally optimal*' to describe the normative ambition of CP. Yet those constitutional structures and values fit awkwardly with the EU's unprecedented non-state form. The idea of constitutional pluralism captures this sense of awkward indispensability – of an approach that seems as unfamiliar, even incongruous, as it does unavoidable. As such, or so I shall claim, CP supplies a key if testing point of departure for thinking through the best terms and future promise of the European constellation.

2. Locating Constitutional Pluralism

Before developing these lines of argument, however, let me make three additional preliminary remarks with a view to locating CP more precisely within the diverse and expansive landscape of EU theory and praxis.

First, as we shall see, the type and balance of critique offered by CP's various rivals differs. Particularism tends to treat CP as descriptively and explanatorily

underspecified or banal, as normatively inconsequential and as only trivially distinctive; or, if normatively consequential and significantly distinctive, as unattractively so. Holism, too, treats CP as normatively unattractive, but also as descriptively or explanatorily false or inadequate. Only federalism would accept the significance of CP's descriptive and explanatory claim, and share certain aspects of its normative orientation. In elaborating its arguments along somewhat similar lines to CP, federalism is also more explicitly concerned than the other approaches with the deeper political foundations of the EU. But from this more rounded perspective, federalism offers itself as a better version of the distinctive thesis that CP attempts to articulate.

The different angles of critique offered by these various positions are reflected in our order of argument. We deal first with the *opposition* between constitutional pluralism and constitutional particularism and between constitutional pluralism and constitutional holism. Only then do we turn to the *continuities* or otherwise in the relationship between constitutional pluralism and federalism.

Secondly, and crucially, as the suggestion of continuity between federalism and pluralism implies, the case for CP can only hope to prevail – can only offer something that is of descriptive and explanatory value, normatively defensible and interestingly distinctive - if it is seen as an argument that reaches beneath the legal topsoil to deeper political roots. That is to say, building on my previous work I want to claim that CP cannot simply concern a particular conception of the nature of the legal domain, but must also address the political dynamics and infrastructure which underpin the legal domain; and so ultimately CP should be considered as much a matter of political theory as of legal theory.³ And it is precisely because constitutional thought and praxis is

³ See my 'The Idea of Constitutional Pluralism' (2002) 65 *MLR* 317-359; see also M. Loughlin, 'Constitutional Pluralism: An Oxymoron' (2014) 3 *Global Constitutionalism* 9-30. 19-21.

capable of engaging with the deeper seam of political thought and praxis that it is important to understand our approach as one not merely of legal pluralism but of constitutional pluralism.⁴

My case rests on the role that constitutional ideas, talk and practice play in the generation and sustenance of the polity, whether national or otherwise. The emergence and intensification of constitutional discourse at any particular site – a process whose maturity is often marked by the promulgation of a written Constitution but need not be – has closely interconnected expressive, epistemic and design functions. As I have argued elsewhere, a constitution-building process or project supplies ‘both trace and catalyst’⁵ of political community. It is an important trace of political community in that the preparedness of the provisional or putative members of a collective entity to consider that collective entity in an overtly constitutional register is already a sign and expression, however modest, of the commitment to put things in common whose terms they seek to elaborate through a collective scheme. And the elaboration of that scheme is also a catalyst of political community; it is so in two senses, referring, respectively, to the construction of the knowing collective subject and the specification of the means and object of political community. On the one hand, the process of elaboration and ongoing adjustment of the scheme of collective action involves the stipulation of a reference point and procedure of collective agency, and so the identification of a collective subject over time. On the other, the substance of the scheme thus elaborated provides the normative guidance and institutional vehicle to articulate and pursue that common commitment as a continuous project of collective action.

⁴ On the relationship between constitutional pluralism and the broader category of legal pluralism, with its roots both in studies of law and imperial relations and in a more general sociology of co-existing or overlapping normative orders, see e.g. R. Michaels, ‘Global Legal Pluralism’ (2009) 5 *Annual Review of Law and Social Science* 243; N. Walker, above n1, 114-118.

⁵ N. Walker, ‘The Place of European Law’ in G. De Burca and J.H.H. Weiler (eds) *The Worlds of European Constitutionalism* (Cambridge: CUP, 2012) 57-105, 104.

Granted, a first impression of much of the literature under the banner of constitutional pluralism suggests a more restricted focus of attention. Much of its emphasis has been on a limited set of legal tests and contests, and, more specifically, on courts and on the respective judicial authority of the Court of Justice and of the apex courts of the member states. That standard version of CP I will not reproduce here except in the broadest of brush-strokes.⁶ It begins by contrasting the perspective of the Court of Justice, which, through the early development of doctrines of direct effect, primacy, pre-emption, fundamental rights etc., asserted its originality and finality of jurisdiction – invoking the autonomous authority of the Treaty of Rome and its successors - in matters of EU law, with that of the national courts, for whom the validity of EU law remained grounded in national constitutional authority. And while European clauses in national constitutions and other doctrines of national constitutional law readily accept the priority of EU law as interpreted by the Court of Justice in the normal case, national courts, with the German Constitutional Court in the vanguard, will also more or less explicitly seek to reserve the final authority of the national constitution for certain exceptional cases and in accordance with certain longstop considerations. In particular, national constitutional courts hold the authority of the Court of Justice and the EU legal order to be conditional upon respect for national constitutional rights, for the limits of the (however extensive) competences conferred upon European institutions in the Treaties, and, increasingly, for certain unalterable core provisions or other integral features of the constitution that are deemed indispensable to the

⁶ See, in particular, the pioneering work of Neil MacCormick; 'Beyond the Sovereign State' (1993) 56 MLR 1-18; *Questioning Sovereignty* (Oxford: OUP, 1999), See also the influential work by Miguel Maduro, Mattias Kumm and Daniel Halberstam. A good collection, containing pieces by all these and others, is M. Avbelj and J. Komarek (eds) above n1.

sustenance of national constitutional identity and to the standing of the state as a self-governing polity.⁷

The spotlight on courts is understandable for a number of reasons. It offers a window on the broader tensions and dilemmas of the EU, identifies a point of movement in an often blocked political system, and provides a key institutional reference for a supranational order that has always defined itself in a strongly legal register. Yet there is also a downside. Understood as a court-centred enterprise CP, as we will see, is often taken to task for its supposedly overblown claims - for exaggerating either the success or the importance of its contribution. On the one hand, it can be criticized for conceding, or worse, celebrating fluidity, uncertainty, unprincipled concession, even conflict, at the high judicial level.⁸ On the other hand, it can also be criticized for overstating the contribution made by these specifically judicial answers (such as they are) to deep questions of constitutional fundamentals in resolving the EU's problems of legitimacy.⁹

If either of these emphases is viewed as the crux of CP, then it surely deserves such criticism. But if CP's point of departure, in line with the broader tradition of constitutional thought, is the generative forces of political community, its central focus will instead be upon the deeper structural condition of the EU as a divided power system. It follows that attempts to find resolution at the judicial level comprise merely one response – immediate and unavoidable, yet also merely reactive and provisional -

⁷ For a thorough overview, see J Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 *ELJ* 389-422. For an overview of recent developments, with particular reference to decisions arising out of the EU's response to financial crisis, see F. Fabbrini (ed), 'The European Court of Justice, the European Central Bank, and the Supremacy of EU Law' Special Issue (2016) 23 *Maastricht Journal of European & Comparative Law* 1.

⁸ See e.g. Cruz, n7 above; D. Kelemen, 'On the unsustainability of Constitutional Pluralism' (2016) 23 *MJ* 136-150; C. Tinnemans, 'The Magic World of Constitutional Pluralism' (2014) 10 *European Constitutional Law Review* 349-58

⁹ See e.g. Loughlin, above n3. ; K. Tuori, *European Constitutionalism* (Cambridge; CUP, 2015) 38-44.

to tensions inherent in that deeper structural condition, and CP should instead be judged in terms of the overall treatment of that deeper trait that is possible within a constitutional frame of reference. And that is why, in turn, the most productive conversation does not ultimately take place between CP and particularism or holism, but between pluralism and federalism, with its deeper foundations in political institutions and theory.

Locating the relevance of CP, however, is not just a matter of finding the right level of theoretical inquiry and practical leverage. In addition - we should note as a final preliminary point - it requires consideration of the appropriateness or otherwise of the theory and practice of CP to changing historical circumstances. The ideas associated with CP rose to prominence in the 1990s and early 2000s in reaction to the significant strengthening of the supranational centre in the wake of the Single European Act and the Maastricht and Amsterdam Treaties, and so in a very different political climate than that which attends the post-Constitutional Convention, post-Lisbon, post-Euro-crisis EU. Even if CP were capable of speaking in explanatorily and normatively appropriate terms to the legal and political environment of the EU during that earlier period, can it *still* do so today? That is far from evident. There has always been an aspect of CP thought and practice that suggests its message is a contingent one, more or less relevant to particular circumstances. Perhaps CP simply described and addressed the growing pains of a young and immature political structure, or was a passing phase suited to a (relatively) benignly progressive period in the EU's history.¹⁰ Or, perhaps, if we view the EU's life cycle in more abbreviated terms, but also in a gloomier light, the emergence of CP indicates the beginnings of degeneration rather than a phase of growth, and its continuing manifestation is evidence not of the health of the Euro-polity

¹⁰ See e.g., Kelemen, above n8.

but of critical illness, or even the onset of senility. Yet I want to argue that the value of CP, such as it is, should be understood in none of these transient terms. Rather, it should be regarded as a resilient feature of the deep political culture and practice of the EU, and, indeed, one of growing significance. Only as such can we appreciate its distinctive explanatory and normative credentials.

2. Beyond Particularism and Holism

(a) particularism

The particularist approach - a term I now¹¹ prefer to the more frequently used but here confusing ‘monism’¹² - holds that there is no explanatory or normative dividend to be gained from going beyond either the national constitutional perspective or the EU constitutional perspective, or, indeed, beyond a position that entertains both of these perspectives discretely conceived, in seeking to come to terms with the EU as a legal complex. We can imagine three versions of the particularist approach, which in turn flow from two different stances towards the particularity of legal systems. These stances are in turn *situated* or embedded, and *detached*.

The situated or embedded stance involves the assumption and endorsement of

¹¹ In earlier writings, I used the term ‘monism’. See e.g., Walker, above n3.

¹² In philosophical terms, which are the terms with which we are here concerned, monism can refer to any position that claims an understanding of a variety of things from a singular perspective or in accordance with a singular reality or substance. And in these terms, what I am here calling particularism is indeed a form of monism. Yet as a term of art in international law doctrine and scholarship, monism is used in a quite different sense. Here it represents a view that treats international law (which includes EU law, at least as originally conceived) as indivisible from domestic law, and so as applicable in domestic law without the need for a domestic instrument of implementation. It does so in conceptual opposition to dualism, which treats international law (including EU law) as distinct from domestic law, and so as inapplicable in domestic law absent a domestic instrument of application. Yet the very choice whether to adopt a monist or dualist approach to international law lies with each domestic legal system as an aspect of its own singular (and, therefore, philosophically monist or particularist) view of the legal universe, and so both monism and dualism in international law are compatible with philosophical monism. Hence the scope for confusion in using the term ‘monism’ at the broader philosophical level, and my preference for ‘particularism’.

one particular perspective, either a state-centred constitutional perspective or an EU-centred constitutional perspective, as the exclusive basis from which to make sense of the EU constitutional configuration. Either the member states' legal orders, with their comprehensiveness of jurisdictional reach, their original claim to sovereignty and their open-ended capacity to absorb other legal materials – including those of international law in general and the supranational law of the EU treaties in particular, can provide an exhaustive elaboration of the EU legal order on their own constitutional terms.¹³ Or the EU itself can supply an equally full constitutional account of the EU legal order. The EU's competence may be Treaty-based, and to that extent textually and functionally circumscribed. Yet its judicial claim, anchored in the doctrines of primacy and direct effect, to control the terms and outer limits of that competence, together with its capacity, similar to that of the state, to absorb extraneous legal materials - in its case by reducing the norms and institutions of other (state) legal orders to its own terms and service (in particular, relying on state institutions for much of the execution and enforcement of its normative regime as well as for some of its basic legislative elaboration in the implementation of 'directives'), allows it to understand and portray itself, like the state, as the maker and master of its own legal universe.

In this category of situated particularism, therefore, there is simply no need from a legal perspective to look beyond the open system either of the state-centred or the EU-centred position to make sense of the whole of the EU order. What, then, tends¹⁴ to explain a choice of one over the other, is a matter of ideological preference rather than analytical refinement. The state-centred perspective is more likely to be aligned

¹³ On these typical features of a state legal system, see J. Raz, *The Authority of Law* (Oxford: OUP, 2009, 2nd ed.) 116-20.

¹⁴ Although there is no necessary connection in this regard. See e.g., K. Jaklic, *Constitutional Pluralism in the EU* (Oxford: OUP, 2014) 1-9.

with a position that understands the EU in ideological terms as a resiliently state-derivative structure, while the EU-centred perspective is more likely to be aligned with a position that understands the EU in ideological terms as a structure with an autonomous state-transcending legitimacy, and so as a distinctly non-parochial version of particularism.¹⁵

Yet the particularist position can also be detached from either of these *particular* forms of particularism, so to speak. It can simply involve equal recognition of the in-principle normative exclusivity and closure of both state-centred and EU-centred conceptions. Rather than endorsing one over the other, the coherence of each on its own terms may be acknowledged, including the open-ended capacity of each to absorb the other in its own normative terms. On this detached view, what we are left with when confronting the EU legal configuration is quite unexceptional. It is merely a multiplicity of particular legal systems adjacently positioned, each claiming for its own purposes an exclusive and exhaustive jurisdiction even at the outer boundaries of its normative capacity - a feature of legal-institutional life with which, from the very diversity of sovereign statehood, the world has long been familiar.¹⁶

We can now begin to see why and how both situated and detached versions of particularism would be critical of CP. The situated view, either state-centred or EU-centred, could accuse CP of culpable fence-sitting – of failing to identify a dominant (descriptive-explanatory) constitutional narrative or to commit to the best (normative) such constitutional narrative to account for the EU. In so failing, CP may be seen from either situated perspective, whether state-centred or EU-centred, to provide

¹⁵ See e.g. Cruz, above n7.

¹⁶ See e.g. P. Eleftheriadis, 'Pluralism and Integrity' (210) 23 *Ratio Juris* 365-89; N. Barber, 'Legal Pluralism and the European Union' (2006) 12 *ELJ* 306.

unnecessary succor to the other perspective.¹⁷ More generally, CP may be seen as gratuitously inviting the possibility of judicially focused normative conflict, uncertainty and irresolution *between* perspectives, either of which, according to their respective supporters, would be capable of avoiding any such conflict, uncertainty or irresolution *within* its own situated terms.

The detached version of particularism, for its part, endorses one or other of the following critiques of CP. Either the specification of a diversity of constitutional orders situated in close jurisdictional proximity merely repeats an unremarkable institutional fact in a new setting, in which case CP's claim is a trite assertion of *plurality* without any genuine insight into the kind of mutual recognition and accommodation that might instead make this case one of *pluralism*. Or such novelty as it possesses is purchased at the price of normative incoherence, in that the only way in which a genuine pluralism becomes possible is through a process of 'judicial double-overlap'¹⁸ by which uncertainty and attendant conflict over the final authority in EU law is internalized in either or both systems (national-constitutional and EU) - so raising the spectre of arbitrariness in judicial decision-making.

In a nutshell, the particularist, whether situated or detached, criticizes CP for the inadequacy of its descriptive/explanatory account, in so doing presenting a scenario that encourages the unnecessary indulgence of constitutional conflict and uncertainty in the highest courts, as well as the elevation – perhaps even the willing self-elevation – of the judiciary to a position of undue institutional power within the EU legal

¹⁷ See e.g., Cruz, above n7, 414, criticizing CP's acknowledgement of the reservations of national constitutional courts; and conversely, see P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-state* (Oxford: OUP, 2010), 266, criticizing CP's recognition of the autonomous constitutional standing of EU law.

¹⁸ Jaklic, above n14, at 197, discussing, *inter alia*, Eleftheriadis and Barber, above n16.

constellation. And in its turn, how CP responds to this tells us something of significance about its historical strengths and weaknesses and its perennial challenges

In its favour, CP is on strong if narrow ground in claiming that, at the descriptive and explanatory level, the pattern of intersection and prospect of collision between legal orders that it contemplates is neither contrived nor unexceptional in the ways that its critics suggest. Granted, the particularist is correct to point to the in-principle completeness of vision of an ‘own’ legal-normative universe available from any and all particular legal systemic positions, regardless of the overlap in-practice of their jurisdictions. Yet it is not clear how we can fail to have regard to that very overlap-in-practice. Situated particularists, much as they might wish it to be otherwise, cannot point to the uncontroversial dominance of their preferred situated perspective to pre-empt or address the problem. Detached particularists cannot easily equate the marginal and largely inconsequential *de facto* overlap of jurisdictions elsewhere in the global landscape of self-contained legal-normative systems with the evidently consequential overlap of jurisdictions inscribed in the relationship between the EU and its member states. If we set the jurisprudence of the Court of Justice alongside that of national constitutional or supreme courts from Germany in the European centre, to Denmark in the North, Spain in the West, and Poland in the East, we can only conclude that the meaning of the EU legal order is capable of differing in ways that are of significance for its overall direction and scale of ambition depending upon whether one adopts an EU-centred perspective or any of many state-centred perspectives. That message is clear from various celebrated lines of cases, ranging from questions of the priority of general rights claims¹⁹ or, more recently, particular rights claims in the implementation

¹⁹ As in the famous *Solange* judgments of the German Constitutional Court; *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540; *Wünsche Handelsgesellschaft* (BvR 2, 197/83; [1987] 3 CMLR 225

of the European Arrest Warrant²⁰ and in criminal procedure more generally;²¹ to the acceptable terms of Accession of new member states;²² and thence, in a line of cases initiated in the context of the ratification of the Maastricht Treaty²³ and intensified in the wake of the sovereign debt crisis, to the permissible limits of the encroachment of common policy areas, in particular common monetary and economic policy, on the democratic self-governing capacity of member states.²⁴

To be sure, significance remains a matter of weight rather than frequency. Just because the national and EU legal orders are so tightly and densely interlocked in comparison to the normal cases of national-national or national-international legal systemic relations, and just because the points of judicial contestation are often so vital to the self-understanding of each, the comparative rarity of such occurrences cannot obscure their importance. Against that backdrop, absent any objective basis to choose between either of the situated particularisms, detached particularism is also deficient in failing to show how the theoretical capacity of both state-centred and EU-centred conceptions of European legal order to treat and absorb the other legal order in its own terms need not lead to practical conflict or impasse, and so to the frustration or compromise of either set of normative purposes self-referentially conceived.²⁵

But if this shows the resilient importance of the CP diagnosis, the value of its

²⁰ For discussion of the voluminous national case law, see Cruz, above n7 398-403.

²¹ See e.g. Case C-399/11 *Melloni v Ministerio Fiscal*

²² For discussion, see W. Sadurski, 'Solange, Chapter 3': Constitutional Courts in Central Europe - Democracy - European Union. (2008) 14 *ELJ* 1-35.

²³ See in particular in the context of German attitudes to new Treaty powers, BVerfGE 89, 155, *Brunner v. European Union Treaty* [1994] 1 *CMLR* 57 (Maastricht Treaty); BVerfGE 123, 267, [210] 3 *CMLR* 276 (Lisbon Treaty);

²⁴ Case C-370/12 *Pringle v. Ireland* EU-C 2012: 756 (legality of the European Stability Mechanism Treaty; Case C-62/14 *Gauweiler*, EU:C 2015:400 (answering the first preliminary reference ever made by the German Constitutional Court on the legality of the European Central Bank's Outright Monetary Transactions Programme, at BVerfG, Case No.2 BvR 2728/13, order of 7 February 2014.)

²⁵ See e.g. M. Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in N. Walker (ed), *Sovereignty in Transition*, (Oxford, Hart, 2003) 501-537.

normative contribution remains contentious. Even if the problem it identifies is a genuine one that should not be avoided, its answers do not easily convince. Any of the potential lines of solution CP offers in the way of trans-systemic constitutional engagement meet with objections or reservations. A first line, known as ‘radical pluralism’,²⁶ can be criticised for reverting to a kind of para-legal or even extra-legal realism in which pragmatic considerations of mutual dependence and survival between the respective systems and their judicial agents allow only a haphazard reciprocal accommodation. A second line, involving a so-called ‘contrapunctual’ process whereby there is a gradual, dialogue-enabled, blending of perspectives in a common judicial ‘melody’ from different systemic starting points, can be criticized for deploying a suggestive metaphor to compensate for its normative under-specification.²⁷ A third line, committed to the specification of certain umbrella principles, such as subsidiarity, participation, accountability and legality, shared by the different systems and allowing them to regulate and overcome their differences, can be criticized for its resort to a precariously high level of generality and abstraction as the magic formula for the resolution of highly specific divergences and disputes between different domain concerns.²⁸

All of these solutions, whatever their merits, are exposed to a double challenge. In the first place, and most immediately and obviously, there is the legal question. Given that these approaches continue to understand law’s authority in system-specific terms, the search for a solution that is legal-system-transcending yet still *legal* remains

²⁶ See e.g., N. MacCormick, *Questioning Sovereignty* (Oxford: OUP, 1999) ch.7; N. Krisch ‘Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space’ (2011) 24 *Ratio Juris* 386-412

²⁷ Maduro n25 above.

²⁸ See e.g., M. Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State” in J. L. Dunoff and J.P. Trachtman (eds) *Ruling the World?* (Cambridge: CUP, 2009) 258-325.

deeply elusive, some would say paradoxical. Either the task is avoided, as in the pragmatic realism of radical pluralism; or it is pursued in terms that struggle in what might seem a somewhat strained manner – or, even, if viewed from a less generous perspective, a somewhat wishful manner - to avoid the precipices of unconnected plurality and higher unity on either side of a fragile construction. That is to say, they strive, more or less persuasively, to specify new terms and dynamics of legal convergence that do not simply either collapse back into the dictates of divergent legal authorities or threaten the extinction of that very underlying divergence.

In the second place, there remains the deeper political question. In seeking to address inter-systemic cleavages only in terms of actual or potential conflicts arising from the division and overlap of the legal competences associated with these systems, we are addressing symptoms rather than causes. The more profound challenge concerns how we might conceive of a trans-systemic ‘order’²⁹ of constitutional authority as a viable prospect *at all*, however such an order might then proceed to deal with hard cases. How, if we dismiss the situated particularist’s assumption of the clear priority of either centre or parts, and equally, the detached particularist’s assumption of mutual exclusivity, can we account for the circumstances and terms in which the overlap of heterarchically related constitutional authorities, rather than undermining or eroding the legitimacy of each such authority, becomes a condition of legitimacy of the combined whole?³⁰

(b) Holism

²⁹ See Culver and Guidice, above n2.

³⁰ For a philosophical treatment of the idea of ‘relative authority’ under conditions of plurality and the requirement of mutual responsiveness as a condition of legitimacy, see Nicole Roughan, *Authorities. Conflicts, Cooperation, and Transnational Legal Theory* (Oxford: OUP, 2013)

A more radical solution to the problem of inter-systemic fault-lines, and of a trans-systemic constitutional order more generally, is offered by the holistic method. Whereas particularism tries to immunize itself from the potential difficulties of inter-systemic encounter through sticking to a system-internal approach, the holistic approach simply denies - or at least downgrades - the very relevance of systemic thinking in law. According to that approach, an elegant version of which is to be found in George Letsas's neo-Dworkinian conception of 'harmonic law',³¹ we should reject the very premise, closely associated with the tradition of legal positivism, that law³² comprises a system of rules predicated upon a particular socially sourced claim of authority. If we hold instead that law is a matter of the articulation, weighing and application of system-independent principles within a holistic framework of political morality, then the problem of legal disputes implicating conflicting argumentative resources at the margins of different systems dissolves – or at least recedes in significance. Where the deepest point of reference is always one of values and principles that possess a trans-systemic quality, claims of formal authority associated with the systemic source and location of the dispute become irrelevant or secondary.

The plausibility of the holistic approach, however, depends upon prescription and description being closely aligned. The normative emphasis on the promotion of a harmonizing integrity across the single cloth of law is closely bound up with a descriptive and explanatory claim that already understands high appellate courts as forums of general principle rather than guardians of particular systems, whereas the normative solutions mooted in the conversation between the particularists and the

³¹ G. Letsas, 'Harmonic Law: the Case against Pluralism' in J. Dickson and P. Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (Oxford: OUP, 2012) 77-108.

³² understood as a general category ('the law') rather than the description of a certain type of individuated norm ('laws')

pluralists tend to start from the opposite system-relative understanding of how the law presently stands. Yet just because of this requirement of close alignment, holism is an approach that, even if it were normatively attractive, is especially vulnerable in the trans-systemic context to the test of plausibility of its prior descriptive and explanatory account. For it remains the case that whatever may prevail, or may be possible, as regards normative integrity *within* a legal system, must be viewed less promisingly *across* legal systems.³³ That is so because a legal system is not simply a matter of jurisdictional authority, but is also host to a particular tradition and culture of political morality; and it is that shared culture, reflected in and supported by the formal hierarchy of rules, rather than the formal hierarchy of rules alone, that accounts for law's system-specific coherence and the thickness of system boundaries. What is more, even if a plausible case for a holistic and harmonic approach could be made between the EU's many legal systems at the elite level of judicial pronouncement and exchange, just as is the case with the judicial-level responses offered by CP to the particularists, the question of underlying segmentation in the political constellation remains to be explored and resolved. The fact of systemic plurality and the requirement of mutual accommodation, to repeat, goes to the very foundations of the EU order and the legitimacy of its authority claim.

3. Federalism and Pluralism

What then of the example, and the challenge, offered to CP from federalism? We noted at the outset that whereas particularism and holism offer themselves in opposition to the major claims of CP, federalism presents itself as a superior alternative; as a framework sympathetic to the pluralist diagnosis of the condition of the EU but offering

³³ A point Dworkin himself conceded in his late sojourn into the theory of international law; 'A New Philosophy of International Law' (2013) 41 *Philosophy and Public Affairs* 2-30.

a better explanatory and normative model, and one with a much deeper intellectual heritage. What is more, unlike particularism and holism, and indeed unlike many strains and emphases within CP itself, federalism operates at the level of the political system as a whole – where, as we have argued, CP must also sound if it is to have traction as a serious account of the EU.

The basic tenets of the federal claim can be laid out quite simply. Federalism, broadly conceived, is ‘the genus of political organization that is marked by the combination of shared rule and self-rule.’³⁴ The federal compact, then, is based upon the co-existence of two types of political body. On the one hand, there are the (self-ruling) federal members, while on the other there is the (shared) federation of common institutions and jurisdiction. The federal compact is entered into on a voluntary basis, its object to inaugurate and sustain a dual political system. Both the separate parts and the common part should be preserved, each speaking to a different background constituency or *demos*; the various member states and their ‘peoples’ on the one hand, and the ‘people’ or citizens of the federation as a whole on the other. Importantly, both the preservation of the separate parts and the common part and their combination is guaranteed in and through a founding Constitutional Treaty, which, in keeping with the general purpose of any scheme of constitutional thought and practice serves symbolic, epistemic and design functions. First, it supplies an expression of the founding commitment to the new dual system. Secondly, it provides a reference point of collective authorship for the development of that dual system. Thirdly, it gives normative direction and architectural form to this duality; it does so through setting out a divided power regime which guarantees competences to each level, and which also

³⁴ R. Watts, ‘Federalism, Federal Political Systems and Federations’ (1998) 1 *Annual Review of Political Science* 117-37

supplies institutions to exercise and monitor these competences and ensure the co-ordination of the whole in the light of these different spheres of competence.

In the view of many commentators, the European Union can be presented as fitting the federal model.³⁵ From the very outset the compact between the Member States to form the Union as a whole may be understood as having supplied the rudiments of a dual system. It is one that has been developed and preserved through many Treaty iterations, from Rome to Lisbon, and, as such, that compact may be understood as having gradually evolved into a ‘Treaty-Constitution.’³⁶ In particular, both the demarcation of competences and the institutional division and co-ordination of labour between state-centred bodies (Council, European Council, and, increasingly, national Parliaments themselves) and EU-centred bodies (European Commission and European Parliament) established through these Treaties operate to sustain the federal order. On this view, crucially for our purposes, the Gordian knot between hierarchy and order is broken. The European Union is presented as a coherent legal and political order, but one that implies a dual rather than a unitary sourcing of authority and which accords no necessary priority to one site or level - state or European - over the other.

Yet to the extent that federalism, for all its claimed fit with the unfolding European story, has not *in fact* provided a strong narrative of self-understanding of the EU, a challenge is posed to defenders of the federalist thesis. Can we really claim federalism as a convincing model for the EU when none of its key constituencies – citizens, member states or even its central institutions – consistently view and present themselves as operating within a federation, and, where, as we shall see, they may even

³⁵ See e.g., K. Nicolaidis and R. Howse *The Federal Vision* (Oxford: OUP, 2002); R. Schütze, *European Constitutional Law* (Cambridge: CUP, 2012) ch2; see also Baquero Cruz above n7, 408-10.

³⁶ Schütze, above n35, citing with approval, E. Stein, ‘Towards Supremacy of Treaty – Constitution by Judicial Fiat on the Margins of the Costa case’ 1964-65 *Michigan Law Journal* 491.

incur significant ideological cost by asserting the ‘f’ word in public discourse? ³⁷

One robust answer from the federalist side seeks to turn defence into attack and shift the burden of proof back on to federalism’s critics. The partial failure of federal self-identification, so the argument runs, may be attributed to a blinkered European statist tradition that understands constituent power, sovereignty and constitutional identity in purely unitary terms.³⁸ According to this view, the inability to conceive of these key ingredients of political authority other than in a singular manner has led to the exaggerated retention of the national/international distinction in thinking about the EU. The undeniable dispersal of political authority in the new European configuration, in other words, tends to be treated through its externalisation in accordance with an inside/outside divide rather than through a dualised sense of the internal. And tellingly, from the federalist perspective that very incapacity or unwillingness within the blinkered European tradition to conceptualise duality in an infra-systemic rather than in an inter-systemic manner provides the stick with which to chastise CP. As a supposed exemplar of that blinkered tradition, CP is deemed unable to overcome the fractured legal and political condition of its own self-understanding.³⁹ Armed with the insight that political authority has evolved along plural lines in contemporary Europe and seeking to avoid reducing that plurality to a single hierarchy, CP nevertheless is frustrated in its efforts to develop that insight in a productively ‘federal’ manner – one that channels and resolves conflict within the wide boundaries of a single legal and political order - by denying itself the very conceptual tools of graduated internal authority necessary to do so.

³⁷ See e.g., A. Borriello and A. Crespy ‘How to not speak the F- word: Federalism between mirage and imperative in the euro crisis’ (2015) 54 *European Journal of Political Research* 502-24

³⁸ See in particular, Schütze, above n35, 53-59.

³⁹ Schütze, above n35, 67-68 an fn114

How might the constitutional pluralist respond to that counter-charge? Crucially, this depends upon a deeper examination of the role of one item in the catalogue of unitary political concepts – namely the state itself – within federal political theory. Proponents of the federalist vision of the EU have long insisted that the appropriate form of federal compact for the EU is *not* a European federal state. And, indeed, it is precisely the spectre of the European federal state, viewed by most as a terminal betrayal of the ethic of a dual power system between member states and EU, that has made the ‘f’ word “taboo”⁴⁰ in many European political circles. Instead, Euro-federalists talk of a Federation of States,⁴¹ or some otherwise labeled federal union short of statehood. Yet while it is perfectly in keeping with the etymology of federalism to use it to characterise entities other than states, and so to treat it as a gradual rather than a categorical concept,⁴² we need to look more closely at what the consequences of adapting federalism to the non-state EU context are. And if we do so, we find that the supposed superiority of the federal vision as a means to characterize and to shape the dual power system of the EU depends to a significant extent upon just these statist or ‘state-like’ tendencies that the Euro-federalists are at pains to deny.

The declared advantage of the federal option over the pluralist option, as we have seen, involves the internalization of conflict in a manner that creates normative and institutional order without hierarchy, and in so doing achieves a stable, legally validated equilibrium between the two levels and sources of power. But there appear

⁴⁰ Borriello and Crespy, above n37

⁴¹ Schütze, above n35, 79; see also at the political level, the well-known intervention by Joscha Fischer, then German Foreign Minister, in his Humboldt speech of 2000, which is seen as catalyst for the European constitutional project of that decade. ‘From Confederacy to Federation- Thoughts on the Finality of European Integration’ <http://ec.europa.eu/dorie/fileDownload.do;jsessionid=9TXVSzSHrJ4WmfrgWXjLpLNZSnXQtGypBkh2S2GGnD3K9MW6wybp!1615003456?docId=192161&cardId=192161>

⁴² See e.g. See O. Beaud, *Théorie de la Fédération*, (Paris: PUF, 2007); A. Follesdal *Federalism* Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/federalism/>

to be two flaws in such an approach, one conceptual and the other practical. In the first place, does not the very establishment of such an order by constitutional means imply an authoritative foundation that would undermine the very equilibrium it seeks? If a European Constitutional Treaty, or Treaty-Constitution - that is to say, a Treaty which assumes constitutional standing amongst all its constituent parties, and so, as a typical documentary Constitution, claims precedence over any other legal sources within or encroaching upon its jurisdiction, and is amendable, if at all, only by the constitutional authors acting as one constituent power (in practice, usually by special majority) - comes to be understood as the measure of any new federal order, then, in accordance with the federalist insistence upon a foundational constitutional compact, would not that Constitutional Treaty become *the* final source of legal authority for the EU territory as a whole? The system put in place might, indeed, be one of institutional diversity - a duality of spheres of competence, government organs and represented constituencies, but the authoritative foundations of the system guaranteeing and sustaining that duality would now themselves be dependent upon the singular authority of the Constitutional Treaty and its equally singular, if diversely composed constituent power. In these circumstances, would we not, then, revert by default to a version of EU-centred particularism, and so to a polity which in legal form, if not necessarily in political ethos, is indistinguishable from federal statehood?

Yet this scenario, I would contend, is merely hypothetical. It does *not* accurately capture the EU's current political state of being, and this brings us to the second, practical objection to the federalist approach. The only initiative in the EU's history explicitly aimed at elevating its constitutional self-projection to the status of a canonical written constitution, namely the Convention on the Future of Europe's draft of 2003, failed in part precisely because of widespread concerns across European populations

about the possibility of its asserting or implying just that strong federal-state-like claim of a governing constitutional authority for the European legal and political space as a whole.⁴³ In any event, and underlining the formidable practical impediment to a federal settlement, even if it had been successfully ratified it is highly unlikely that the Constitutional Treaty would have been accorded such elevated constitutional standing. Rather than a constitution of the whole, the unresolved mix of polity-shaping ambitions motivating its initiative and drafting and the weight of residual fears about federal statehood⁴⁴ suggest that, in the absence of any clear message in the text itself,⁴⁵ the Constitutional Treaty would probably have come to be treated, not least by the top courts of the member states, as the constitution only of the higher ‘federal’ or supranational level. In such a scenario, the member states would retain final authority over their own internal constitutional order, including those elements bearing upon the nature and limits of the federal compact set out within the Constitutional Treaty. In other words, a ‘federal’ constitution, even if successfully ratified and implemented, would probably have been understood and interpreted in more modest constitutional

⁴³ See e.g. N. Walker, ‘The European Union’s Unresolved Constitution’ in M. Rosenfeld and A. Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP, 2012) 1185-1207

⁴⁴ The polity-shaping ambitions of the supporters of the process differed widely, ranging from a desire to provide a platform for eventual continental federal statehood to a state-centred determination to set textual barriers against any further integration; see e.g., N. Walker ‘European Constitutional Momentum and the Search for Polity Legitimacy’ (2005) 3 ICON 211-38.

⁴⁵ The constitutional draft did contain some provisions that, in their range and ambition, arguably implied the ‘constitution of the whole’. These included Art I-5, holding that ‘The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’, and a detailed Article I-60 on the terms of voluntary withdrawal or ‘secession’ of member states. Both clauses, indeed, were subsequently inserted into an amended TEU under the Treaty of Lisbon (arts 4 and 50 respectively). But in many other respects, the constitutional draft read as a constitution only of the federal level. To take just one example, its competence catalogue sought to delineate the competences of the Union but not those of the Member States, despite the express initial ambition of the President of the Convention to pursue a comprehensive approach; see V. Giscard D’Estaing, ‘The Convention and the Future of Europe: Issues and Goals’ (2003) 1 ICON 346.

pluralist terms.

We will return to the option of the ‘halfway house’ of an authoritative constitution of the federal level in our concluding sections, as it is central to any fully developed CP model. For now, however, let us summarize the limitations as well as the resilient suggestiveness of the broader federal case. It would seem that the constitutional adoption of a comprehensive federal order by the EU would be bound to replicate the very statist logic of an underpinning unity of sovereign authority that the Euro-federalists want to overcome. That is to say, while there is a commitment to respect or promote a resilient duality of jurisdictions, institutions and political sources in the Euro-federal model, the very grounding of that commitment in the performative act of a Constitutional Treaty would signal that the deeper question of sovereignty – of ultimate authority - had now been resolved into an underlying singularity.⁴⁶ In the event, however, any such robust federal prospect remains academic, as the EU in its present condition lacks the political support even to contemplate such a move. If these objections hold, it is not clear what, if any, advantages the federalist vision holds over constitutional pluralism in ‘ordering’ the terms of the EU’s political and normative

⁴⁶ Schütze, above n35 61, despite his strong advocacy of a federal model, in fact resists this conclusion for the EU. He holds instead that the non-acceptance of absolute supremacy of European law by the Member States and ‘the ambivalence surrounding supremacy and sovereignty can be viewed as part and parcel of Europe’s federal nature’. But if the EU sovereignty question remains unresolved in this way, as I also believe to be correct, then the status of any central constitutional claim must be considered to be that a partial or relative authority, dispositive of matters only from the perspective of the European people acting together supranationally and only for these matters in which they are acting together supranationally. In that case, a clear distinction holds precisely along the lines theorized by CP between the EU on the one hand and the mature federal model exemplified by the United States on the other, notwithstanding Schütze’s own treatment of the two as closely comparable. The sovereignty question, of course, was also unsettled and ‘ambivalent’ during the antebellum period of the new American Republic, but the Civil War and its constitutional aftermath resolved matters unequivocally against CP and in favour of federal statehood within a single overarching constitutional order. This seems a distinction worth preserving, and indeed one that brings into clear comparative focus the key question of whether the long-term trajectory of the EU will, like the USA, tend in the direction of federal statehood. Yet it is also a distinction that an insistence on using federal language for options on either side (of its state/non-state divide) is in danger of blurring and downplaying.

diversity; to the contrary, certain disadvantages are apparent, as the ‘f’ word seems to carry the perennial danger of association with a state-centred logic.

More generally, however, regardless of the most apt label for a mature EU - federalist, neo-federalist or pluralist - consideration of the arguments underlying the fuller federal option makes vivid what is at stake in the treatment of a resiliently divided power system in which a claim to constitutional authority has been developed at and for the common part to match that made at and for the distinct parts. And this does at least suggest one indirect benefit of focusing on that federal alternative. In insisting on the idea of a popularly endorsed founding Constitutional Treaty, the federal vision clearly indicates a solution that reaches down into the basic underpinnings of the divided power system. In so doing, it exposes the historical limitations of viewing constitutional pluralism as a largely elite-driven process, with the constitutional claim at and for the common part more a matter of the discursive reconstruction by judges and, more forcibly, by academic sponsors and fellow travellers, of a series of incremental shifts in the underlying balance of legal and political forces, than the conscious product of a wider political circuit of collective self-assertion, self-recognition and self-projection.⁴⁷

And so we are left with the unanswered question of how to endow a genuinely pluralist constitutional order, in all its unavoidable awkwardness, with a form of stability that combines two features. Like the federal solution, its settlement should enjoy a deeper and wider endorsement across its various constituencies; yet unlike the federal solution, that endorsement should not be such as to undermine the order’s basic

⁴⁷ A discursive process of ‘small ‘c’ constitutionalism’ that has intensified rather than receded following the failure of the 2003-5 process; sometimes, indeed, involving the defensive claim that the EU’s existing ‘small ‘c’’ *acquis* has rendered a ‘big ‘C’’ process unnecessary, and to that extent in direct reaction to and compensation for that very failure; see Walker, above n43.

condition of duality.

4. The Age of Constitutional Pluralism

Once upon a time that unanswered question appeared decidedly less urgent, and so lay largely unaddressed. There used to be a pragmatic view of the EU, one with widespread currency, which held that ‘if it ain’t broke, don’t fix it’.⁴⁸ On this view, the divided power system that frames the federalist and pluralist visions does not necessarily demand close scrutiny or intervention. If Europe’s ‘permissive consensus’⁴⁹ in its early decades was about abundant ‘output legitimacy’ rather than deficient ‘input legitimacy’,⁵⁰ then the structural balance between states and EU need not be so finely calibrated, and the authoritative credentials of each need not be so closely monitored. The precise terms of normative trade, and the exact pedigree of authority were matters that could be sidestepped or discussed in a manner free from angst about the threshold viability or minimal terms of co-existence of legal and political communities. The message of Constitutional Pluralism, in that early perspective, would have been of limited political resonance, as indeed were most theories of integration that sought to define and assess the EU in terms of its structural DNA *qua* polity as opposed to its deliverables. The kinds of problems CP would identify and address, even if not denied along particularist lines, overridden along holistic lines, or treated along federalist lines, would be viewed as only the remotest precursor of any condition that could threaten

⁴⁸ J. Weiler, "Fischer: The Dark Side" in C. Joerges, Y. Meny and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*. (Florence: Robert Schuman Centre, 2000); available on-line at: <http://www.iue.it/RSC/symposium/>

⁴⁹ See e.g., L. Hooghe and G. Marx, ‘A postfunctionalist theory of European integration: from permissive consensus to constraining dissensus’ (2008) 39 *British Journal of Political Science* 1-23.

⁵⁰ See F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: OUP, 1999).

the polity as a whole.

Only after Maastricht's significant deepening (in EMU) and widening (across Three Pillars) of integration, and especially after the German Constitutional Court's admonitory decision on Maastricht,⁵¹ did CP find its moment. It came of age, as it were, as 'a response to the (national judicial) response' to the polity's growth spurt. It reflected and reacted to a new anxiety - a sense that there was more at stake in deciding and declaring the authoritative foundations of the European polity, and that these foundations had become precariously balanced.⁵² Yet the emphasis on Courts and on judicial highlights also cushioned that message, encouraging the view that the problem remained occasional, specialist and of largely expressive significance, rather than endemic, general and structural. And in keeping with the sense of this being a matter of growing pains, the problems to which CP was a response could still plausibly be viewed as a passing phase, a product of circumstances; of the stepwise transformation brought about the '1992' completion of the single market, the Maastricht Three Pillar reforms and Eastern Enlargement, and so likely to settle down again in due course.

No one thinks that way any longer. If there was something complacent about the earlier pragmatism, we now live in a time of widespread foreboding and of 'despondency and lethargy'⁵³ over the future of a polity which has had its basic legitimacy questioned as never before. The 'capacity-expectations gap'⁵⁴ exposed by the EU's management of the uneven costs and benefits of the sovereign debt crisis in the Eurozone has undermined levels of output legitimacy already depleted by the post-

⁵¹ BVerfGE 89, 155, *Brunner v. European Union Treaty* [1994] 1 CMLR 57.

⁵² See Cruz, above n7.

⁵³ M. Dawson and F. De Witte 'From Balance to Conflict: A New Constitution for the EU' (2016) 22 *ELJ* (forthcoming).

⁵⁴ C. Hill, 'The Capability-Expectations Gap, or Conceptualizing Europe's International Role' (1993) 35 *JCMS* 305-28

Maastricht extension of jurisdiction into more contentious economic, social and security matters, while exposing - and arguably exacerbating - longstanding problems of input legitimacy. In turn, this has led to an acceleration of institutional unsettlement, the exposure of new class and regional cleavages, and an unprecedented deepening of cross-national solidarity challenges.⁵⁵ CP, in this altered perspective, assumes a new complexion. It graduates from being a relatively contained exercise in assessing and managing the high judicial and legal-theoretical implications of the EU's early movements towards polity maturity to what, with the benefit of a longer view, might now be seen as a response to the inherent, unavoidable and perhaps unbearable stresses of its mature condition. Most pointedly, the repetitive recent tensions between the German Constitutional Court and the Court of Justice over the relationship between the untouchable core of national economic sovereignty and the powers of the Central Bank and other European institutions to protect the overall system of Monetary Union suggest a significant intensification of the kind of strategic inter-Court play of reservation and counter-reservation inaugurated after Maastricht, and perhaps even its end-game.⁵⁶

But if the imbalance of constitutional forces is part of the problem, their rebalancing must surely also figure in the solution. For if we take a step back, and return to CP's explanatory and normative roots – shared with federal (broadly conceived) and with other closely related notions such as Union or *Bund*⁵⁷ - in the idea of a divided power system responding to dual national and supranational constituencies, it is difficult to imagine how we might tackle the legitimacy problems of the European

⁵⁵ See e.g., J. Habermas, *The Crisis of the European Union: A Response* (Cambridge: Polity, 2012) C. Joerges, C. Offe, *Europe Entrapped* (Cambridge: Polity, 2015); M. Everson and C. Joerges, 'Reconfiguring the Politics-Law Relationship in the integration project through conflicts-law constitutionalism' (2012) 18 *ELJ* 644-66

⁵⁶ See, in particular, the recent *Gauweiler* jurisprudence, above n24; and for extensive discussion, see Fabbrini (ed) above n7.

⁵⁷ See M. Avbelj, 'Theory of European Union' (2011) 36 *European Law Review* 818-836.

supranational constellation in the absence of a (re)settlement that is itself of ‘constitutional’ quality and proportions.

Why is this so? To recall, the key functions of constitutionalization are both as catalyst and prompt of political community - establishing a design capacity and an ‘intelligent’ collective subject - and as trace and background expression of commitment to that political community. Yet the weakness of precisely these functional drivers carries much responsibility for the difficulties of supranational Europe. We can see this by reference to four fundamental problems affecting the contemporary steering of the EU, with each of which we can associate a particular constitutional deficit.

In the first place, there is the problem of *structural drift*. At the time of the failed Constitutional Treaty, and its minor key replacement at Lisbon, it was assumed that the main constitutional design problem of the coming years would be one of stasis – of a blocked system lacking the means to adapt to new circumstances. In one sense, however, nothing could be further from the truth. The response to the crisis has been one of veritable constitutional ‘mutation.’⁵⁸ The development of the conditionality criteria for debtor states and the more general requirements of fiscal discipline and detailed macro-economic monitoring under the European Semester have shifted the balance of power notably towards the European centre. And at the centre, as is well summed up in the spectre of ‘executive federalism’⁵⁹, under the new structures of economic and monetary governance there has been a further dramatic shift in power to the executive organs of the European Council and Commission and away from European and national Parliaments. These developments, in turn, are exacerbated by

⁵⁸ A. Menendez, “An EU in Constitutional Mutation?” 20 ELJ (2014) 127-41; see also D. Chalmers, ‘The European Redistributive State and a European Law of Struggle’ (2012) 18 ELJ, 667-93

⁵⁹ Habermas, n55 above, 12.

the move towards a more differentiated Treaty regime, with the use of international law for the European Stability Mechanism (ESM) and the Fiscal Compact bypassing the normal system of EU Treaty amendment in a way that reinforces the power of initiative of coalitions of powerful states. The message of all these developments, the last most blatantly, is that, such is the latent capacity for transformation within the sprawling foundations of the European legal structure that the stalled Treaty system is no proof against the kind of fundamental change that reinforces existing divisions and creates new cleavages and constituencies of winners and losers within the EU.⁶⁰ In other words, there would, indeed, a problem of blockage if we could understand the Treaty system as a strict framework of constitutional pedigree, but the pattern of creative adaptation and external supplementation of an already extensive, loosely and fitfully assembled constitutional *acquis* that we have witnessed ‘solves’ this problem precisely at the expense of any such an authoritative understanding of Treaty foundations.⁶¹

Secondly, there is the epistemic problem of *inadequate reflexivity*. As Dawson and De Witte have sharply noted, there is in fact no shortage of proposals for further structural reform in the EU today that would serve to counter or at least to channel drift. These range from a further intensification of executive federalism, through an increase in differentiated integration and the encouragement of a multi-speed Europe, to the deepening of a system of responsible Parliamentary Government at the centre, with the Commission transformed into a fully political executive answerable to an enhanced European Parliament.⁶² The difficulty with such proposals, however, with their quite

⁶⁰ On the ‘authoritarian liberal’ direction of these changes, see Wilkinson ‘Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?’ (2015) 21 ELJ 313-39

⁶¹ On the reasons why the EU constitutional *acquis* has historically lacked a clear, constant and well-disciplined normative hierarchy, with particular reference to the diverse forces of ‘sectoral constitutionalization’, see Tuori, above n9.

⁶² M. Dawson and F. De Witte, ‘Self-Determination in the Constitutional Future of the EU’ (2015) 21 ELJ 371-83.

different consequences for the balance between the dual foundations of the EU, is that they are rarely articulated in the broader public sphere and never mutually engaged in a spirit of collective self-determination. They are instead put forward by limited constituencies as point of departure from the present impasse rather than imagined, as in the constitutional tradition, as a reflexive effort on the part of the constituencies making up the polity as a whole to (re)build a political project from first principles.

In the third place, there is the prior problem of *frustrated initiative*. Even to contemplate such a project of collective self-determination requires a form of meta-procedural consensus – or at least the commitment to reach such a consensus – as to the identity and remit of the relevant collective appropriately engaged in such a process of self-determination. Yet the elusiveness of such a prior consensus or basic expressive commitment, ironically, is symptomatic of the reasons why such an engagement is urgently required. What we seemed to be faced with, in short, is a ‘paradox of initiative.’⁶³ Just to seek a common way of addressing the key question ‘who decides who decides’⁶⁴ is already likely to expose disagreements amongst European publics and elites about which constituencies should be represented and how, which in turn reflects different and unreconciled philosophies and interests concerning the appropriate scope, sources and drivers of integration.⁶⁵ More pointedly, even to dignify supranational ‘Europe’ as a project in need of a collective author with a collectively self-determining project might for some constituencies be a unwanted concession to the kind of entity Europe might but should not be, and so should be avoided or approached warily.

⁶³ N. Walker, ‘Our Constitutional Unsettlement’ [2014] *Public Law* 529, 542.

⁶⁴ See M. Maduro, ‘Europe and the Constitution: What if this is as good as it gets?’ in M. Wind and J.H.H. Weiler (eds) *European Constitutionalism beyond the State* (Cambridge: CUP, 2003) 74, 76.

⁶⁵ See e.g. Walker, above n44.

Fourthly and finally, we can indicate a consequential problem of *speculative engagement*. An interesting phenomenon can be observed in the contemporary discourse on EU reform. Increasingly, commentators seeking to overcome the problems of structural drift, inadequate reflexivity and frustrated initiative, talk and act ‘as if’ they were planning or issuing conclusions from a Constitutional Convention or a similar such constitution-making initiative. Dawson and De Witte’s own recent proposals for the internalization of political conflict within the EU, for example, are silent as to the form of engagement and delivery, but clearly presuppose something like a constitution-making process and event.⁶⁶ Equally, Fritz Scharpf’s suggestions as to how to reboot the EU on day zero after the crisis also presuppose, without quite spelling it out, that the crisis will have reached such a pitch that only a process of constitutional renewal would be capable of regenerating the polity.⁶⁷ And similarly, Jurgen Habermas’s conception of Europe as a refashioned ‘transnational democracy’ talks specifically about the development of the constitution of such an entity as a ‘thought experiment’⁶⁸ rather than as emerging from a concrete political process.

Why such reluctance to spell out ways and means? It cannot be that the various authors are only interested in elaborating ideal forms and arrangements, leaving the political articulation and implementation of such recommended forms and arrangements to the exigencies of politics. The very point of thinking constitutionally is to imagine how we might mobilise and harness unruly forces and impose a frame on political thought and action. There would be something artificially restrictive, or at least question-begging, therefore, in treating the matter of the generative forces behind that

⁶⁶ Above n53

⁶⁷ F. Scharpf, ‘After the Crash: a perspective on multilevel European democracy’ (2015) 21 ELJ 384-405.

⁶⁸ J. Habermas, ‘Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How it is Possible’ (2015) 21 ELJ 546-557, 554.

vital process of constitutional generation as outside our sphere of interest and contemplation. So the speculative tone and tendency to disengage from constitutional specifics must have particular roots. In part the problem is certainly one of a damaged brand. The failure of the 2003-5 Constitutional Convention process casts a long and lingering shadow. But this damage, in turn, merely reflects how the utilization of an explicitly constitutional method in the supranational context aggravates the paradox of initiative referred to above. Constitutions, as we have seen, are the canonical means by which a particular political community assert itself as such and engages in collective authorship, treating problems of structural elaboration and adjustment in an open process of engagement of interests and values. Yet, as our critique of the 'federal' conceit of a singular Treaty-Constitution indicates, reservations about endorsing the state-like associations of a nominally constitutional form and vehicle threaten to exacerbate rather than resolve the more general problem of finding common cause for a commonly engaged initiative-taking between those more or less committed to a pan-European project.

But this should not be a reason to throw the constitutional baby out with the statist bathwater. Earlier, we mentioned the 'halfway house' of a constitution of the 'federal' or supranational level, which might have been the unscripted fate of the draft Constitutional Treaty if it had been successfully ratified a decade ago. Any future settlement of our divided power system under the banner of constitutional pluralism must draw from that example in a more consciously deliberated and projected fashion - and not merely as the compromised outcome of a fuller federal ambition - to provide a novel parsing of constitutional commitment, capacity and competence. On the one hand, as we have seen, only a constitution or its functional equivalent can provide the symbolic and epistemic basis for renewal of and reflection upon the system of

supranational governance through a process of collective authorship. On the other hand, any such constitutional project cannot advertise its claims and wares in such a way as would suggest its emulation or eclipse of the state as a form of original political community, thereby deterring those many who are wary of such a connection from offering their endorsement or involvement. And so such a constitution must address in a different way the problem, central to the debate between pluralism and federalism, of its authoritative source and extent.

As Habermas has argued, the source of such a settlement would have to comprise the ‘double sovereign’ of European citizens and the already constituted peoples of the member states.⁶⁹ But if this double sovereign feeds into a single constituent power, the consequent fusion in a singular documentary process and achievement remains arguably indistinct from the founding condition and duly constituted authority of many federal states.⁷⁰ In addition, therefore, what is needed as a distinguishing factor is an explicit recognition that this constitution, and its constituent authority, is only concerned with transnational institutions and competences, and that national jurisdiction over unpooled capacity remains rooted in national acts and systems of constitutional authority. What requires to be delivered, then, is a new kind of constitutional dualism, one that guards against opposite forms of slippage in order to track the deeper dualism of the political system. While any new constitutional settlement cannot be a constitution of the whole without seeming to beckon a full-blown federal state, unless that new settlement nevertheless succeeds in standing autonomously from the state constitutions within its own common sphere of competence, and so on an equal footing with these state constitutions, the authoritative

⁶⁹ *Ibid.* 554

⁷⁰ See discussion in Section 3 above.

sense and commitment of its being an independent act of collective authorship by the European people acting together is lost. And in this way, we can finally envisage how the overlap of heterarchically related constitutional authorities of the common part and the local parts, rather than undermining or eroding the legitimacy of each such authority, becomes a condition of legitimacy of the combined whole.

5. Putting Constitutional Pluralism into Practice

But we need, in conclusion, to acknowledge and address two telling practical challenges to this deeper and politically engaged approach to CP. In the first place, how feasible would the introduction of any such scheme be? And in the second place, even if feasible, what, if any, real difference would re-arrangement of the constitutional furniture into a pluralist pattern make?

As regards the first challenge, why should we be any more confident that we can overcome the paradox of initiative if we proceed along constitutional pluralist lines than if we seek the singular settlement favoured under the federal approach? After all, such is the level of disagreement over the nature and extent of the European supranational project, and so symbolically loaded is the ‘c’ word, that we cannot simply assume that the practical obstacles in the way of a CP approach, for all its careful and emphatic delimitation of the nature and scope of the common authority, would be less formidable than for any other explicitly constitutional approach. The failure of the earlier Constitutional Convention to negotiate the hurdles of national referendums in Holland and France in the face of the articulation of often inchoate nationalist fears and concerns about the integrationist assumptions of constitutional language is surely

testimony to this.⁷¹

Yet there is another side to the argument. Giscard d'Estaing's Constitutional Convention might not have succeeded, but the specifically constitutional character of its commitment to a European-wide political community did develop a momentum that surprised many EU watchers at the time. It did so, moreover, in circumstances where, as noted, its pluralist modesty was, at best, an inference that could be drawn from the text rather than an explicit commitment in self-limitation. The document provided little proof, therefore, against its presentation by Eurosceptical forces as the anchor of a federalist 'power grab'. What is more, the limited substantive agenda of the Constitutional Treaty (and its subsequent sub-constitutional re-incarnation as the Lisbon Treaty) meant that this ambiguous constitutional symbolism rather than any robust project of reform tended to dominate debate. Today, by contrast, the need to refashion the design principles underlying the supranational architecture has become much more pressing.⁷² As we have seen from our discussion of the attitude of *speculative engagement*, perhaps never before have there been more root-and-branch reform alternatives on the table, yet a strategy and route-map to bring the relevant political constituencies *to the table* in a constitutionally committed fashion remains lacking. Through the explicit prospect of a settlement of the supranational level, the option would become available for the EU citizenry to come to the table in a fashion

⁷¹ See e.g. S. Hobolt and S. Brouard 'Contesting the European Union? Why the Dutch and the French Rejected the European Constitution' (2011) 64 *Political Research Quarterly* 309-22

⁷² See Habermas above n68; Scharpf above n 67; Dawson and de Witte above n53; see also B. Ackerman and Maduro, 'How to Make a European Constitution for the 21st Century' *The Guardian*, October 2012; <http://www.theguardian.com/commentisfree/2012/oct/03/european-constitution-21st-century>

M. Avbelj, 'Now Europe Needs a Constitution', *Verfassungsblog*, <http://verfassungsblog.de/author/matej-avbelj/>;

Of course, not least because of the ambivalent symbolism, many such recent design initiatives continue to shy clear of conventional constitutional language and forms; see e.g. G. Amato, E. Guigou, V. Vike-Freiberga and J.H.H. Weiler, 'Towards a "New Schuman Declaration' (2015) 13 *ICON* 339-42 (contributing to the Commission's "new narrative for Europe' debate).

which, unlike its predecessor initiative, make clear the pluralist and so non-hierarchical relationship of any new settlement to the constitutional systems of the member states.

But even if successfully mobilised, what practical difference would a pluralist documentary initiative in the form of a constitution of the supranational level actually make? We should not pretend that this is an easy question to answer, or that any constitutional initiative could make a profound difference in isolation. Constitutional settlements typically operate at such a level of societal generality and, in the case of the more successful ones, do so over such extended time frames and in such complex interaction with other forces, that it is always difficult to anticipate the impact of any particular settlement from the immediate circumstances and terms of its enactment.⁷³ Yet, reverting one final time to our three basic constitutional functions, we can point to certain advantages.

As already noted, the present, post-crisis blocked treaty system has highlighted the absence of a reflexive framework of collective commitment and planning and has allowed for structural drift. A new explicitly constitutional model for the supranational level, then, could offer epistemic and design advantages. Not only would it allow large choices of institutional architecture and policy direction to be considered and renegotiated, it would also encourage, in accordance with a familiar constitutional logic of normative hierarchy, a leaner and therefore more legible and less intrusive set of constitutional pre-commitments. That is to say, a renewed constitutional model, in replacing the present sprawling mass of Treaty-level provision with a sparer model, could both focus on a clearer and more coherent framework of governance and avoid placing too many matters beyond the reach of ongoing political engagement and

⁷³ See e.g., J. Melton, T. Ginsburg, and Z. Elkins, *The Endurance of National Constitutions* (Cambridge: CUP, 2009).

contestation in the federal domain.⁷⁴ In that way statist fears of too many matters being resolved beyond national influence in a top-heavy federal settlement could be assuaged at the same time as concerns for a more active politics of the federal level could be answered.

Just as significant, however, would be the strength of the new expressive commitment to a dual system of political community. Dawson and De Witte have suggested that *the* most important question facing the new Europe is ‘how do we want to live together in this particular place on earth?’⁷⁵ Yet the perspective of CP reminds us that each and all of our citizens has more than one ‘particular place’ and community of political attachment. In a ‘post-holistic’ constitutional environment, I have argued elsewhere, we must recognize that ‘questions of the common interest in collective decision-making are simply not questions that, at the deepest level of political self-interrogation, we can envisage all...affected addressing comprehensively *in common*’.⁷⁶ Rather, our collective identities, and the conceptions of common interest they engage, interlock rather than coincide. And so, in the European context, Dawson and De Witte’s ‘most important question’ is not one but three. Each citizen has to ask herself how to live together both nationally and supranationally, and also with regard to the proper boundary and terms of interaction between these two contexts of living together. A documentary constitution of and for the higher pan-European level, then,

⁷⁴ This is an objective which, arguably, would make a new settlement attractive to apparently opposing forces; both to those who prefer a more open set of value choices and so a more active supranational Euro-politics, such as Dawson and De Witte (above n53), and to those whose first priority is to curb the power of supranational Europe to play the constitutional trump card against national governments (as in the case of D. Grimm, see e.g. ‘The Democratic Costs of Constitutionalisation: The European Case’ (2015) 21 *ELJ* 460-73)

⁷⁵ ‘Europe Does Need a Constitution: but of what Kind?’ *Verfassungsblog*
<http://verfassungsblog.de/europe-does-need-a-constitution-but-of-what-kind/>

⁷⁶ N. Walker, ‘Beyond the Holistic Constitution?’ in P. Dobner and M. Loughlin (eds) *The Twilight of Constitutionalism* 291-308, (Oxford: OUP, 2010) 307

should affirm not just the importance of that continental ‘particular place’, but also of the relationship of co-equality between that form of communal political life and the various and diverse communal political lives of the 28 member states.

Finally, and coming full circle, we return to the judicial level at which the questions of CP first arose. The new dualism of constitutional settlements, and so of political identities and communities, would not, of course, resolve judicial conflicts at the margins of the two systems. Constitutional language is simply too open-textured, and, as is palpable from the present state of political debate within and about the Union, the interests of national and supranational communities are insufficiently harmonized to avoid clashes. A constitution of the supranational level would, however, achieve two worthwhile objectives. First, the drafting of the new constitutional instrument would provide an opportunity to specify anew the limits of supranational jurisdiction, and so to reduce or at least clarify the terms of conflict with the national level from the supranational perspective. Secondly, and perhaps more importantly, it would lend conviction and legitimacy to judicial perspectives on both sides which, in asserting the constitutional authority of their own system were also prepared to acknowledge the equal constitutional authority of the other system.⁷⁷ In the presence of a documentary

⁷⁷ CP sceptics sometimes assume that the judges could solve the problem of conflicting systemic perspectives themselves. Kelemen, for example, (above n8) argues that if national constitutional courts in general, and the German Constitutional Court in particular, in making a finding of incompatibility of EU law with the national order were to forego the remedy of a declaration of inapplicability of a particular EU norm and opt instead for a general declaration of the unconstitutionality of continuing national membership of the EU in the absence of a reconciliatory amendment either of the national constitution or of the relevant EU law, this would shift the onus in cases of constitutional conflict away from the jurisdictional posturing and strategic manoeuvring of judges and towards the broader political process. I fully agree with the sentiment that conflicts within the divided EU system are better addressed at root by political means, but, just because of that, I would argue, against Kelemen, that the shift from the judicial to the political domain can itself only be effectively and legitimately initiated within the political, indeed constitutional domain. The kind of co-ordinated judicial initiative suggested by Kelemen is both very difficult to imagine against a continuing backdrop of boundary conflict, and, even if it were achieved, it is not clear why such a decisively judicially-led adjustment of the terms of normative trade in Europe’s divided power system would be acceptable to all relevant political and public audiences.

constitution of the supranational level, those tending towards national constitutional particularism would instead have to concede the indisputable institutional fact of a parallel supranational constitutional authority. Equally, those tending towards supranational constitutional particularism would, on the insistence of their own supporting documentary source, instead have to accept the hardness of the boundaries of supranational jurisdiction and the limits of legislative *kompetenz-kompetenz*,⁷⁸ and so concede the preservation of an unimpeachable domain of national constitutional self-regulation. In this way, the very understanding that makes the attitude of mutual recognition and accommodation associated with CP necessary and appropriate would be politically validated and textually affirmed. And so, no longer the somewhat strained or even wishful product of a particular line of constitutional theory,⁷⁹ pluralism rather than particularism might become the default judicial perspective on the EU order as a whole on either side. This, in turn, would surely encourage less defensive judicial dispositions across the national-supranational fault-line and the more generous contemplation of what is or might become constitutionally in common across the different systems.⁸⁰

⁷⁸ On the distinction between (limitable) legislative and (in practice, only self-limiting) judicial *kompetenz-kompetenz*, see J.H.H. Weiler and U.R. Haltern, 'The Autonomy of the Community Legal Order - Through the Looking Glass', 37 Harv. Int'l LJ 411 (1995/96).

⁷⁹ See above section 2(a).

⁸⁰ My view accords with that of Tuori (above n9), who claims that only if we adopt an attitude of 'exclusive perspectivism', whether on Kelsenian or Luhmannian grounds, must we dismiss possibility of officials of one system being open to influence from and dialogue with officials of another system. Yet as Tuori says, 'perspectivism is inevitable in law, but legal solipsism is not' (86). On his alternative, non-exclusive version of perspectivism, the degree to which officials are in fact open to the other system will turn on contextual considerations, including the broad legitimacy and security of any underlying political settlement guaranteeing the standing of both systems.

